No. 86 1826

Supreme Court, U.S.
FILED
MAY 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL S. GOULDING,

Petitioner,

vs.

IRVING FEINGLASS, IRWIN SOLOMON, and THOMAS DIETZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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May 12, 1987

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the facts as alleged, when taken in the light most favorable to the Petitioner, state a violation of Petitioner's Fifth Amendment rights:

   a. Does one have a protectible property right in his business as a lawyer.

   b. Must there be an actual "legal barrier" to the particular right to implicate due process or does it suffice if the complained of conduct has the practical effect of making the right worthless or undesirable.

2. Whether the facts as alleged, when taken in the light most favorable to the Petitioner, constitute retaliation on the part of Respondents for First Amendment expressions, or otherwise a constitutional violation of Petitioner's First Amendment rights, and if so, whether Petitioner should have been permitted to amend his complaint.

3. If a colorable violation of constitutional rights has been alleged, whether the conduct constituting such violation was within or outside of the scope of Respondents' employ.

4. If the conduct alleged is found to be within the scope of the Respondents' employ, whether the constitutional rights violated were clearly established as required by *Davis v. Scherer*, 468 U.S. 183 (1984).

5. In the alternative, whether the objective burden of pleading required by *Davis v. Scherer*, should be applied where the alleged conduct consisted of conspiracy, conduct of a continuing, purposeful and retaliatory nature, and/or where the government's process itself was abused.

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IN THE

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RANDALL S. GOULDING,

Petitioner,

vs.

IRVING FEINGLASS, IRWIN SOLOMON, and THOMAS DIETZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Randall S. Goulding (Goulding) prays a writ of certiorari to issue to review the opinion of the Seventh Circuit Court of Appeals, which affirmed the District Court's grant of Respondents' Motion for Summary Judgment in a civil rights action premised upon the First Amendment, Fifth Amendment and 42 U.S.C. Section 1983.

OPINIONS BELOW

The February 4, 1987 opinion of the Seventh Circuit is published at 811 F.2d 1099; the March 13, 1987 denial of the petition for rehearing is unpublished. Both its opin-

ion and the denial of rehearing can be found at Appendix (App.) A and B respectively. The district court's decision can be found in Appendix C.

JURISDICTION

The Seventh Circuit's opinion was entered February 4, 1987 (App.A). Goulding's petition for rehearing was denied on March 13, 1987 (App.B). This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

Fifth Amendment

. . . No person shall be . . . deprived of . . . liberty, or property, without due process of law.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Nature Of The Case

The case at bar was filed by the Petitioner, Randall S. Goulding (also referred to as "Goulding") against the Respondents, agents of the Internal Revenue Service, pursuant to *Butz v. Economou*, 438 U.S. 478 (1978); and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation*, 403 U.S. 388 (1971). The Petitioner has alleged that the Respondents have conspired and have engaged in conduct outside the scope of their employ, as defined in *Butz*, or even if within the scope of their employ, as in *Bivens*, it was done with the intent to deprive Petitioner of his constitutional rights under the First and Fifth Amendments to the United States Constitution. The Petitioner has further alleged that if such conduct should be found to be outside the scope of the Respondents' employ, the Respondents should be held accountable for various pendant state law offenses.

B. Summary Of The Facts

1. Background of the Parties. The Petitioner, Goulding, is a duly licensed attorney in Chicago, Illinois. Prior to the alleged actions of the Respondents (described below), Goulding's primary practice consisted of counseling clients in tax planning, and practicing before the Internal Revenue Service and in the United States Tax Court (App.Ex. G, p.1).[1] As a direct result of the actions of the Respondents, Goulding has irrevocably lost his tax-related clients and fees which they represented (App.Ex.G, pp.14, 15 and 18 and D.C.Ex.C, D, E, and F,[2] Affidavits of former clients

[1] App.Ex.____, is in reference to the record on appeal; the letter is in reference to the specific item.

[2] D.C.Ex.____, is in reference to the District Court Record; the letter is in reference to the specific item.

and referring professionals; and App.Ex.H, I-1, I-2 and I-3). Respondents Dietz and Feinglass are Revenue Agents employed by the Internal Revenue Service (App.Ex.C-1, C-2, C-3, F-1, F-2 and F-3, Affidavits of the Respondents). Until the briefing before the Seventh Circuit, both Dietz and Feinglass had been assigned to the same group, worked at the same location (App.Ex.F-1 and F-2) and had the same supervisor, Respondent Solomon (App.Ex.C-3 and F-3). From 1971 through 1978 Goulding was employed by the Internal Revenue Service, first as a Special Agent and later as a Revenue Agent (App.Ex.G, p.1). For a portion of that period, Goulding worked and became acquainted with Dietz (App.Ex.G, pp.1 and 2).

2. **Initial Conflicts Between Parties.** After Goulding left the Internal Revenue Service, Dietz became involved in the audit of various of Goulding's clients. During such audit, Goulding questioned Dietz's attitude and whether Dietz could conduct an unbiased investigation (App.Ex.G, p.2). Goulding brought such questions and concerns to the attention of Dietz's then-acting supervisor, Jack Smith, who contrary to I.R.S. audit guidelines, failed or declined to take action to resolve the conflict. Subsequently, Dietz filed reports disallowing large portions of the deductions claimed by Goulding's clients and imposed penalties against Goulding. These penalties are now the subject of litigation currently pending in the District Court for the Northern District of Illinois, docket number 83 C 5692 (App.Ex. G, p.3). Goulding's motion for Summary Judgment is now being briefed. Pursuant to discovery, Goulding was furnished with some 300 individual Federal Income Tax returns. As a consequence, suit has been filed by an attorney in California against the United States of America alleging its unauthorized disclosure of tax return information.

3. **Retaliation for Goulding's Suggestion of Dietz's Bias (First Amendment).** Shortly thereafter, Feinglass became

involved in the audit of all Goulding's most important clients (App.Ex.F-2). During the course of these audit investigations, Goulding was notified by various of his clients, other professionals, and business relations that Feinglass had made derogatory remarks about Goulding (App.Ex.G, p.4 and App.Ex.I, I-1, I-2, I-3; and D.C.Ex.Q). One such report, from an attorney, supported by his affidavit (App.Ex.I-2), included that Feinglass told him and others that the only reason for the particular audit result had to do with Goulding's involvement. Goulding confronted Feinglass, who denied making such remarks (App.Ex.G, p.4). However, when Goulding continued to receive reports that Feinglass was making derogatory remarks about him, he again confronted Feinglass, who again denied any such conduct. After still further reports of similar conduct, Goulding confronted both Feinglass and Feinglass's then acting supervisor, Jack Smith (App.Ex.G, pp.4 and 5; and D.C.Ex.R). Goulding suggested that Mr. Smith contact the persons from whom Goulding had received such reports to clear up the apparent misunderstanding. However, Mr. Smith declined (App.Ex.G, p.5).

4. Goulding's Letter to the Chicago District Director of Internal Revenue Service to Remedy Feinglass's Third-Party Remarks. Due to Mr. Smith's refusal to investigate or remedy the situation, on October 4, 1984, Goulding wrote a letter to Robert Starkey, District Director of the Internal Revenue Service (App.Ex.G, p.5; and D.C.Ex.B). The letter informed Mr. Starkey of Goulding's complaints against Feinglass and requested that immediate action be taken.

5. Events immediately following Petitioner's October 4, 1984 Letter to the District Director and Events Immediately Following his November 19, 1984 Letter to Irwin Solomon and Letters to Commissioner Egger and Congressman Porter. Immediately after Goulding sent the letter to the District Director and in response to such letter, Dietz and Fein-

glass engaged in the following conduct: a) Within one week of the October 4, 1984 letter to the District Director, Feinglass interviewed Goulding's business associates with no apparent connection to the audits being conducted (App.Ex.G, p.7 and D.C.Ex.C). b) Within ten days of this letter to the District Director, Dietz telephoned Goulding to inform him that he would conduct eleven new audits of Goulding's clients and asked Goulding if there were any clients Dietz missed (App.Ex.G, pp.6-7). c) After two months of the October 4, 1984 letter to the District Director and within one week of Goulding's November 19, 1984 letter to Solomon, Feinglass reversed prior audit decisions which had been favorable to Goulding's clients but such reversal came only after (within one week) of Feinglass's discovery of Goulding's association with such clients (App.Ex.G, p.8 and D.C.Ex.D-1, D-2, D-3). d) After two months of Goulding's letter to the District Director, and immediately following Goulding's letters to Commissioner Egger and Congressman Porter, both Dietz and Feinglass violated Internal Revenue Service procedure, in several instances, by refusing to recognize valid powers of attorney filed by Goulding with the Internal Revenue Service on behalf of his clients (App.Ex.G, p.10). e) During the three month period following the letter to the District Director and following the above-mentioned letters, both Dietz and Feinglass made further derogatory comments to Goulding's clients, other professionals and business relations[3] (App.Ex.G, pp.7-10 and D.C.Ex.C and E). f) Three months after the October 4, 1984 letter to the District Director, Dietz sent correspondence to Goulding's clients and business associates making incorrect, deceptive and derogatory remarks about

[3] One such incident involved Feinglass' comment "If I were you I wouldn't have Goulding representing me," which he made to a client of Goulding during a Tax Court proceeding totally unrelated to any audit investigation conducted by Feinglass. This comment caused Goulding to lose at least four clients.

Goulding (App.Ex.I, I-1 and G, pp.5-12; and D.C.Ex.C, D-1, D-2, D-3, E, L and N).

6. Goulding's Attempts to have an Independent Agent Assigned to the Newly Commenced Audit Investigations and Internal Revenue Service's Lack of Responsiveness. Recognizing the Internal Revenue Service's right to conduct audits, Goulding next sought, not to stop the audits, but to formally request that new, unbiased agents be assigned to the newly commenced audit investigations (the audits that were commenced immediately following Petitioner's October 4, 1987 letter to the District Director). In addition to Goulding's letter to Solomon (App.Ex.G), Roscoe L. Egger, Commissioner of Internal Revenue (D.C.Ex.H), and Congressman Porter (D.C.Ex.I), Goulding retained an attorney in Washington, D.C., Paul Tendler, in his efforts to secure unbiased agents for these newly commenced audits (App.Ex.G; and D.C.Ex.O-2).

At approximately the same time, Goulding was informed that his complaint had been referred to the Regional Inspector's Office within the Internal Revenue Service. The inspector assigned to investigate Goulding's claims was John Corcoran. After cursory interviews with individuals from whom Goulding had indicated that he had received reports of derogatory comments made by Feinglass, Mr. Corcoran concluded that Goulding's complaints were unfounded. His conclusions either conflict with the affidavits furnished by those interviewed by Mr. Corcoran (App.Ex. I-1, I-2, I-3 and G, and D.C.Ex.C and Q), or the Internal Revenue Service has concluded that such conduct on the part of Feinglass is perfectly acceptable. Despite several requests by Mr. Tendler and Goulding, both Mr. Corcoran and his supervisor refused to contact the remaining witnesses or to recontact other witnesses in order to clarify the inconsistencies (App.Ex.G, pp.15-17).

On or about January 25, 1985, Congressman Porter wrote to Robert Starkey suggesting that the Respondents be

substituted with independent agents (App.Ex.G; and D.C. Ex.J). Apparently, Mr. Starkey never even responded to Congressman Porter. On or about January 30, 1985, Mr. Starkey finally responded to Goulding's complaints (App. Ex.G; and D.C.Ex.K-2). The response denied any unprofessional, unethical or illegal conduct on the part of Feinglass or Dietz. The letter, however, failed to address the specific actions by the Respondents in making derogatory remarks to Goulding's clients, other professionals and business relations. The letter further indicated that Mr. Starkey declined to provide unbiased auditors for the pending audits, ignoring Congressman Porter's suggestion and the above-referenced Audit Guideline requiring agents to "avoid circumstances that might impair or give the appearance of impairing their independence." MT 4231-46. Shortly thereafter, John Monacco, the Assistant District Director, informed Goulding that the reason for not changing agents was that to do so would create a problem with "employee morale." (App.Ex.G, pp.17-18).

7. **Retaliation to the Filing of this Instant Action.** (a) Upon filing of the instant action, the Respondents immediately threatened Goulding with the imposition of further penalties (App.Ex.G, pp.12-13 and 15, and D.C.Ex.D-1, D-2, D-3 and M). These threats and similar threats of additional penalties which began when Petitioner sent his initial letter to District Director Starkey on October 4, 1984 (App.Ex.G and D.C.Ex.B), have continued to this date. (b) Also upon filing the case at bar, an associate of Respondents, at the Office of the Chicago District Counsel for the Internal Revenue Service, Lauren Gore, Assistant District Counsel Attorney, offered to settle various matters pending in Tax Court for petitioners represented by Goulding. However, she imposed the condition of settlement that Goulding withdraw as counsel, allowing substitution by Frank Emmons, an attorney who had only months before resigned from the same Chicago staff of the Inter-

nal Revenue Service District Counsel (App.Ex.G, pp.13-15). This condition caused extreme embarrassment to Goulding, caused clients to question his competence and his ability to deal with the Internal Revenue Service and caused him to lose fifteen clients. In addition, the settlement was extended to all partners, general and limited, except Goulding. Lauren Gore indicated that such settlement would be extended to Goulding provided that Goulding drop this instant suit against the Respondents (App.Ex.G, p.14). (c) Within two days of filing of the case at bar, Goulding was also notified by Revenue Agent, Greg Mock, that he would begin an audit of Goulding's personal and business tax returns (App.Ex.G, p.14). In the apparent pursuit of this audit, Mr. Mock has, in most instances along with Feinglass, contacted and interviewed nearly every one of Goulding's now former clients and business associates. Mr. Mock has persisted in asking questions with no apparent purpose except to embarrass Goulding and to suggest improprieties on his part, with the apparent underlying purpose to persuade such clients and business associates to cease doing business with Goulding. However, no audit adjustments have ever been proposed. (d) Within two weeks of the filing of the instant action, in an apparent attempt to discredit Goulding, Dietz told Goulding's client that in every matter of disagreement between Goulding and Dietz, the court has upheld Dietz and ruled against Goulding (although Dietz's remark is totally false) (App.Ex.C). (e) Immediately after entry of the September 6, 1985 decision of District Court, Respondents again contacted Goulding, notifying him of new penalties which they sought to assert and injunctive relief they intended to seek. Respondents also notified clients of Goulding of such penalties and possible injunctive action which would be asserted against Goulding (App.Ex.G and D.C.Ex.B).[4] (f) Within two months

[4] Interestingly, the United States Tax Court in *Cooper v. Commissioner*, 88 T.C. No. 6 (1987), a case involving a lease of solar

(Footnote continued on following page)

of such District Court decision, Respondents disseminated "pre-filing notifications" to many of Goulding's clients involved in a solar equipment lease program (Solargistics Corporation), such notification being of the same nature and being disseminated in the same manner as has been found to be violative of IRC Section 6103 in *Mid-South Music Corp. v. Kolak*, 756 F.Supp. 23 (6th Cir. 1984), TN D.C. (1985). (g) Also, immediately after entry of the September 6, 1985 decision by the District Court, the Respondents threatened Goulding with instituting proceedings to bar Goulding from further practice before the Internal Revenue Service, and have since suggested to associates of Goulding, Respondents' desire to so bar Goulding.

8. **Damages.** As a result of the aforesaid actions of the Respondents, Respondents have managed to seriously damage Goulding's reputation in the community, thus causing him to lose fees in excess of $120,000, clients and business associates representing past fees exceeding $680,000, and virtually his entire tax law practice (App.Ex.I, I-1, I-2, I-3 and G, pp.14, 15 and 18; and D.C.Ex.C, D-1, D-2, D-3 and Q).

9. **No Hearing.** Goulding has never been adjudicated as having engaged in any wrongdoing. Furthermore, Goulding has never been provided a hearing, administrative or otherwise, at which to vindicate himself or to establish his complaints against the Respondents. Goulding filed the present actions only after exhausting all remedies available within the Internal Revenue Service.

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[4] *continued*
equipment, extremely similar to the matter (Solargistics Corporation) in which Respondents sought to take action against Goulding, sustained the legal position adopted by *Cooper* and which were identical to those adopted by Goulding, thus upholding the position adopted by Goulding.

REASONS FOR GRANTING THE WRIT

1. There is an apparent conflict among circuits, the Seventh Circuit being alone in the instant case, in its approach to fundamental Constitutional rights. Specifically, as discussed herein, the Seventh Circuit's approach is that so long as the party still has the "right" to speak out, the right to associate, or the right to practice law, or to practice in a particular field of law (no "legal barrier"), the mere interference with such rights, such as the alleged retaliatory nature of the complained-of conduct is not violative of any constitutional right; the unreasonable and even illegal interference with one's right to practice law which effectively deprives one of his legal practice and effectively precludes the further engagement in such practice is not actionable; so long as the victim retains the naked, paper right to so practice.

2. The Seventh Circuit has determined that there is no property right to an individual's "business as a lawyer." This is an issue of great importance not only to the entire legal community but to other professions involving state licensing.

3. *Davis v. Scherer*, 468 U.S. 183 (1984), should be limited to cases involving singular unauthorized conduct and should not apply where the conduct consists of a conspiracy, involving numerous intentional acts, particularly retaliatory in nature, each such act with the designed purpose of depriving the individual of important relationships and Constitutionally protected rights. To hold otherwise, would enable government officials to continually shield themselves from liability, all while repeatedly violating rights of others, each time contending that the right was not clearly established. Petitioner contends that in such instances, proper pleading of subjective and clearly demon-

strable bad faith, supported by third-party affidavits, should suffice to state a cause of action.

1. **Summary.** The case at bar presents two threshold questions, each of which must be answered before this matter may be dismissed. The first question is whether the facts as alleged are sufficient to plead, when taken in the light most favorable to the Petitioner, violation of any of Petitioner's constitutional rights. If no such violation occurred, as the Seventh Circuit decided, the Petitioner cannot establish federal question jurisdiction and the cause is properly dismissed. The Petitioner contends, however, that constitutional violations have been sufficiently pled and/or that with an opportunity to file an amended complaint, that a First Amendment violation can be stated. The Petitioner further contends that action taken by Respondents is inextricably linked to, and was and continues to be prompted by, Petitioner's First Amendment expressions. The existence or absence of such a nexus is a factual determination for the trier of fact.

If a colorable violation of constitutional rights has been or can be stated, the Court must then determine whether the conduct constituting such violation was within or outside of the scope of employ of Respondents. If the conduct was outside of the scope of employ, Respondents enjoy no immunity from prosecution for the damages which they have caused. It is the responsibility of the Respondents to plead and to prove that their actions were within the scope of their employ [*Barr v. Matteo*, 360 U.S. 564 (1959); *Butz v. Economou*, 438 U.S. 478 (1978); and *Lightner v. Fremont Auto Auction, Inc.*, 564 F.Supp. 1112 (N.D. Ill. 1983)], and Respondents have failed to adequately plead or prove that their conduct was within the scope of their employ.

Only where the conduct alleged is found to be within the scope of the Respondents' employ, would the Respon-

dents be entitled to qualified immunity. However, even if the Respondents are entitled to qualified immunity, the Respondents would be liable if their conduct violated clearly established statutory or constitutional rights. The Petitioner contends that the Respondents did, in fact, violate constitutional rights which were clearly established. *Davis v. Scherer*, 468 U.S. 183 (1984). Alternatively, *Davis* should be limited to its facts and to cases involving singular unauthorized conduct. Where the conduct alleged is a conspiracy consisting of numerous intentional acts, particularly retaliatory in nature, each such act with the designed purpose of depriving an individual of important relationships and constitutionally protected rights, the injured party should not be held to as strict a standard as that imposed by *Davis*. Certainly, some qualification or limitation on *Davis* is necessary, so that Government officials, such as Respondents (one of whom is an attorney while the others enjoy legal training), cannot be permitted to rely upon the *Davis* case so as to continually shield themselves from liability, all while repeatedly violating rights of others, each time contending that the right was not clearly established. Instead, Petitioner contends that in such instances proper pleading of subjective and clearly demonstrable bad faith, supported by third-party affidavits, should be sufficient to state a cause of action. Petitioner contends that he has sufficiently pled subjective bad faith on the part of the Respondents.

2. Seventh Circuit's Conclusions. The United States Court of Appeals for the Seventh Circuit concluded that Goulding retained his "right" to practice law and his "right" to represent clients before the Internal Revenue Service and that the Constitution guarantees no more. However, Petitioner contends that this is a very shallow analysis in that the Respondents have effectively deprived Petitioner of his livelihood, his right to practice tax law, by engaging in the above-described course of conduct. As

a direct result, Petitioner has been stigmatized in that his clients and business associates have consequently opted to no longer associate with Petitioner for the fear that Goulding is unable to effectively deal with Respondents and for fear of similar retaliation by Respondents directed at them, which has already occurred in at least three instances, to individuals who furnished Goulding with affidavits in connection with this proceeding. In effect, the Seventh Circuit reasons that the retention of the naked right to practice law, albeit without clients, precludes the maintenance of an action founded in a constitutional violation. The Seventh Circuit also reasons that neither the enjoyment of the right to engage in a field of legal practice nor the right to have clients in a legal practice are protectible property rights or liberty interests under the Fifth Amendment.

The Seventh Circuit has also decided that either the relationship of Petitioner's First Amendment expressions and the corresponding complained-of conduct was merely coincidental, even though so many complained-of acts followed immediately after such First Amendment expressions; or that it is perfectly permissible, at least constitutionally speaking, for Internal Revenue Agents to be prompted by a subject's First Amendment expressions in their decisions to engage in a particular course of conduct, investigatory or otherwise. It is Petitioner's contention that legal determinations as to fundamental Constitutional rights should not rest on technical and meaningless distinctions, but instead should be founded upon the more relevant substantive analysis of how such fundamental rights may have been affected by the complained-of conduct. Such a technical approach, focusing on form alone would emasculate our fundamental constitutional rights.

3. Violation of Constitutionally Protected Rights.

a. Fifth Amendment. For a due process violation to exist under the Fifth Amendment, the Petitioner must establish

a constitutionally protected property or liberty interest. *Matthews v. Eldridge*, 424 U.S. 319. The Petitioner has never suggested that he should be allowed to block Internal Revenue Service investigations of himself or his clients. Nor does he suggest that there is a Fifth Amendment right to be free from Internal Revenue Service investigation. He further agrees that these investigations are separate and distinct from his tangible or intangible business as a lawyer. However, it is this "business as a lawyer" which is the protected property interest to which Petitioner has claimed an entitlement; it is this "business as a lawyer" which he claims has been directly damaged by the actions of the Respondents; and it is this damage for which he claims an entitlement to due process.

Neither a state nor the federal government has the right to exclude or to deny a person the right or ability to practice law or any other occupation for reasons that contravene due process. [*See Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) and its prodigy: *Sheriff of Tippecanoe County*, 725 F.2d 1136 (7th Cir. 1984); and *Mayer v. Nebraska*, 262 U.S. 390 (1923). See also *Buxton v. Lovell*, 559 F.Supp. 979 (S.D. Ind. 1983).]

The Seventh Circuit determined that no violation of a protected property interest occurred stating:

> The plaintiff has not lost the right to practice law, his license to practice law has not been revoked or suspended, and he is still practicing before the I.R.S. Goulding has failed to cite any cases, nor have we found one case that establishes a property right in an individual's "business as a lawyer." . . . The plaintiff is not foreclosed from practicing law, whether it be in tort, criminal, corporation or tax law. . . . This Court stated in *Perry v. Federal Bureau of Investigation*, 781 F.2d 1294, 1302 (7th Cir. 1986): "[A] liberty interest is not implicated merely by a reduction in an individual's attractiveness to potential employers." There is no legal barrier to Goulding pursuing his practice of law.

Petitioner admits that there is no actual "legal barrier" to his engaging in his practice of tax law, his license was not revoked. However, the collective effect of Respondents' derogatory remarks to third-parties, the harassment, the threats, the sudden commencement of new audits of himself and his clients in retaliation for Petitioner's remarks to Dietz's supervisor, Petitioner's October 4, 1984 letter to the District Director of the Internal Revenue Service as well as the retaliatory conduct for other letters and for the initiation of this instant action has effectively cost Petitioner his legal practice. In addition, this pattern of conduct as set forth above, has created such a stigma on Petitioner's reputation, and Respondents have so effectively communicated to Petitioner's clients and business associates Petitioner's dilemmas with the Internal Revenue Service and with the Respondents (including telling some that the only reason they could not obtain a better audit result was due to Goulding's involvement and making an offer to former clients of Goulding, conditioning the offer upon their being represented by an attorney other than Goulding) that while there is no "legal barrier" to Goulding practicing tax law, the effective deprivation of his clients, business associates and of his reputation has had the practical effect of destroying his tax practice.

While Petitioner appreciates the ease of application of such a rigid rule of an actual legal barrier as being a necessary ingredient to finding a Fifth Amendment due process implication, such a rule neither comports with controlling case law (as described below) nor adequately protects such fundamental rights. The simplicity of requiring actual foreclosure from practicing law for the finding of a liberty interest deprivation may be appealing from the standpoint of finding an easy to apply, objective standard. However, Petitioner, as would others similarly situated, finds little solace in knowing that he has this naked, paper right to practice law, with such dubious value. As a conse-

quence of the complained-of conduct, there is now an actual barrier (although not a "legal barrier") to Petitioner's pursuing his practice of tax law. And this barrier was instituted without any hearing or any judicial determination of any wrongdoing.

The Petitioner contends that he need not be stripped of his license, or forever foreclosed from an occupation, career, or profession in order for a violation of due process to be implicated. [*Family Division of Trial Lawyers of the Superior Court—D.C. Inc. v. Moutrie*, 725 F.2d 695 (D.C. Cir. 1984). See also *Old Dominion Dairy Products v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980); and in *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983), the Seventh Circuit determined that the owner of a liquor license had been deprived of a protected property interest in such license without due process, even though the license had not actually been taken away from him where the alleged deprivation resulted from the defendants' conduct in harassing the plaintiff and the plaintiff's customers and employees. See also *McAdoo v. Lane*, 564 F.Supp. 1215 (N.E. Ill. 1983), where the Court held that harassment of an employee may be sufficient to constitute deprivation of a property interest in one's employ. And in *Bacon v. Patera*, 772 F.2d 259 (6th Cir. 1985), the Court held that harassment by a municipal police force of a private investigator which forced such individual out of business constitutes a cognizable Fifth Amendment liberty claim. The Court remanded the matter to determine whether such conduct was an established procedure or random and unauthorized. If random and unauthorized, the Court felt that a case could be stated only if existing state remedies were inadequate. See also *Pollack v. Baxter Manor Nursing Home*, 706 F.2d 236 (8th Cir. 1983) (McMillan, J., dissenting), modified 716 F.2d 545 (8th Cir. 1983) (per curiam).]

Taking the facts in the light most favorable to Petitioner, Petitioner has established damage to his reputa-

tion in the form of a stigmatization, tangible injuries including lost revenues and lost tax clients, and the effective loss of his tax law practice. Therefore, even if the practice of tax law is not a property right, injury to the conduct of such profession and loss of clients coupled with the stigmatization is a sufficiently tangible injury to implicate due process as a result of the violation of a liberty interest. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Smith v. Board of Education of Urbana*, 708 F.2d 258 (7th Cir. 1983); *Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1978); *Munson v. Friske*, 754 F.2d 683 (7th Cir. 1985); *Lipp v. Board of Education of Chicago*, 470 F.2d 802 (7th Cir. 1972); *Hadly v. County of DuPage*, 715 F.2d 1238 (8th Cir. 1983); and *Sanderson v. Village of Green Hills*, 726 F.2d 284 (6th Cir. 1984) (per curiam). See also *Rutherford v. United States*, 702 F.2d 580 (5th Cir. 1983) where the Court found that the eight months of a lawless and arbitrary vendetta (as opposed to several years in the case at hand) was sufficient to implicate due process and to support a Fifth Amendment claim.

The Petitioner contends that the Respondents, under color of law, have violated both a property and a liberty interest. The Petitioner has never been provided with a hearing, administrative or otherwise, at which to vindicate himself or to establish his complaint against the Respondents. As a result, the Petitioner has been deprived of such interests without process of any kind.

b. First Amendment. Similarly, in First Amendment cases, the right to speak is never actually terminated, i.e., there is never a "legal barrier" to the speech. Instead, it is the retaliation or punitive measures that are taken by the defendant, which measures "chill" speech, that is the subject matter of such actions. Indeed, the Seventh Circuit's decision in the instant case, sanctioning Respon-

dents' retaliatory measures for Goulding's speech can only serve to caution people against speaking out against perceived unfairness in an administrative process. See *Carlson v. Green*, 446 U.S. 14 (1980); *Connick v. Myers*, 461 U.S. 138 (1983); *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1984); and in *Benson v. Allphin*, 544 F.Supp. 464, 467 (N.D. Ill. 1982) the Court held that:

> an official act in retaliation for the exercise of a constitutionally protected right is actionable . . . even if the act, when taken for a different reason, might otherwise have been proper.

In this regard, while Goulding admits that Respondents have a right to audit him and his clients, a right to change audit determinations and a right to engage in some of the other conduct set forth above, it is Goulding's contention that they cannot do so to punish Goulding for his exercise of First Amendment rights.

Goulding was speaking out on matters of public concern—the proper operation of the I.R.S. and the protection of fundamental rights. Such speech occupies the HIGHEST RUNG of the hierarchy of First Amendment values and as such, is entitled to special protection. *Connick v. Myers*, 461 U.S. 138 (1983). This Court has recognized for the past twenty-two years that such speech is the essence of self-government. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Unless compelling reasons exist to limit the exercise of free speech (such as a clear and present danger of imminent lawless action, or where such speech would constitute fighting words or obscenities, or where speech is defamatory), the Constitution allows only the narrowest possible restrictions. Similarly, where the exercise of free speech interferes with the assessment and collection of taxes, it can and should be circumscribed. Where, however, as in the case of Goulding's letters and the initiation of this instant action, the exercise of free speech does not interfere with the assessment or collection of tax, neither

the government nor its employees have the right to penalize an individual for such exercise. *Carlson v. Green*, 446 U.S. 14 (1980); *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1984).

In the case at bar, Petitioner contends that he has been penalized and injured as a direct result of the complaints that he aired in his October 4, 1984 letter to Mr. Starkey (D.C.Ex.B), his December 6, 1984 letter to Mr. Egger (D.C. Ex.H), and other letters as well as for filing this action. The letters did not in any way interfere with the proper administration of the tax laws; the letters merely requested an investigation and urged substitution of revenue agents in all matters in which the Petitioner was involved.

The alleged retaliatory conduct of the Respondents was not aimed at the content of the letters, but rather at the desire to "chill" such criticism of them and thus aimed at the exercise by Petitioner of his right to state his grievances. In stating his grievances, Petitioner did not refuse to comply with requirements of the Internal Revenue Code regarding the proper assessment and collection of taxes; Petitioner's statement of grievances did not interfere with the administration of the tax system. It would therefore follow, that any retaliatory actions taken by Respondents as a result of Petitioner's statement of his grievances would not be related to the compelling interest of protecting the administration of the tax system. In addition, it is evident that as a direct result of the filing of the actions in the case at bar, Respondents escalated their retaliation, engaging in the following conduct: threats of imposition of penalties; and conspiracy with others within the Internal Revenue Service and the staff of the Chicago Internal Revenue Service District Counsel to conduct still further audit investigations and to undermine the effectiveness of Goulding's legal services and to diminish his image in the eyes of his clients (by, in one instance, making an offer to clients conditioned upon the clients firing Gould-

ing). This conduct has had a "chilling effect" upon his further exercise of First Amendment rights. Each time that the Petitioner has spoken out against improper behavior, his words have merely prompted additional retribution. Furthermore, given the complicity of the Internal Revenue Service as an agency and the Justice Department's involvement, there seems to be no available means to stop such retribution.

To overcome a motion for summary judgment, it should suffice to allege an *effective* deprivation of a protectable property interest, liberty interest or freedom to speak, write or associate. It should also suffice to allege, perhaps supported by affidavits as in the case at hand, that punitive measures or retaliatory measures have been adopted to prevent the enjoyment of such rights, without any hearing and without any judicial determination of any wrongdoing. For these reasons, the Petitioner believes that he has sufficiently alleged the violation of his First Amendment rights.

4. Question of Fact. The Seventh Circuit has made the factual determination upon its review of the record, that the Respondents were merely performing their duties when they engaged in the complained-of conduct. However, whether such conduct was in reasonable pursuit of their investigative functions or whether it was in pursuit of some ulterior motive, such as retaliation for the exercise of First Amendment rights and/or to effectively deprive the Petitioner of his right to practice law with his clients and business associates, is a question of fact about which reasonable men could disagree. Furthermore, when one considers the timing of the complained-of activities and Petitioner's exercise of First Amendment rights, it becomes at least arguable, if not incontrovertible, that a cause and effect relationship exists between the exercise of First Amendment rights by Petitioner and the punitive and retaliatory measures on the part of Respondents. Not-

withstanding Respondents' suggestion to the contrary, it should be evident (or at least a matter with respect to which reasonable men can disagree) that the temporal relationship between the First Amendment exercises on the part of Petitioner (including his remark to Dietz's supervisor, about Dietz's bias, his October 4, 1984 letter to the District Director, the other letters to remedy the circumstances, the initiation of this suit) and the correlative complained-of conduct on the part of Respondents was no coincidence. Certainly, it was no coincidence that within a very short period of time following Petitioner's October 4, 1984 letter to the District Director that Respondents immediately commenced all those audit investigations, commenced all those new interviews, changed audit determinations and chose that particular time to engage in the numerous other activities that followed on the heels of such First Amendment expression.

Nor can it reasonably be maintained by Respondents that upon the filing of the instant action, Respondents fortuitiously chose such time to commence an audit of Petitioner's individual income tax returns and corporate law practice tax returns, and to engage in the numerous other courses of conduct that immediately followed the initiation of this action.

On the contrary, it is incontrovertible, given the sequence of events, i.e. the temporal relationship of the exercise of First Amendment rights on the part of Petitioner and the complained-of conduct, that the conduct was prompted by Goulding's First Amendment expressions. Retaliation for First Amendment expression should suffice to constitute a cause of action.

5. **Qualified Immunity.** Assuming a Constitutional violation occurred, the next question that is raised is the existence or absence of any qualified immunity. If the viola-

tion occurred in pursuit of Respondents' investigative functions, and thus within the scope of Respondents' employment, then a qualified immunity is appropriate. If the alleged conduct was outside of the scope of the Respondents' employ, the Respondents are not entitled to immunity of any kind. *Barr v. Mateo,* 360 U.S. 564 (1959). In *Barr,* the United States Supreme Court delineated two primary competing interests:

a. Protection of the individual citizen against pecuniary damages caused by oppressive or malicious action on the part of public officials; and

b. Protection of the public interest by shielding *responsible* governmental officers against harassment and inevitable hazards of *vindictive or ill-founded damage suits* brought on account of action taken *in the exercise of their official responsibilities.* At 360 U.S. 565 (emphasis added).

Barr, and its progeny adhere to the proposition enunciated by Justice White in *Butz v. Economou,* 438 U.S. 478 (1978), that federal officials may not ignore with impunity the limitations which controlling law place upon their powers. Therefore, the immunity is limited to actions within the plain limits of their duties. In *Lightner v. Fremont Auto Auction, Inc.,* 564 F.Supp. 1112 (N.D. Ill. 1983), the Court held that immunity is not a license to act with callous disregard for limitations of office. These cases have sought to limit suits against government employees by placing initial procedural requirements on the plaintiff:

a. The plaintiff initially has a burden of pleading and supporting by affidavit, actions by the defendant, public official, which arguably are outside the official's line of duty; and

b. Then the burden shifts to the defendant to prove that his actions were actually within the scope of his duties. (*Barr* and *Lightner.*)

According to MT 4231-46, an Internal Revenue Agent's function is to "determine the correct tax liability and to maintain a fair and impartial attitude in all matters relating to the examination." Applying *Barr* to the case at hand, the matters delegated to an Internal Revenue Agent, as defined in IRS SPD No. 90228 E, are those reasonably necessary to "the determination of taxpayer liability for federal taxes." Therefore, the actions or statements within the "scope of duties" of an Internal Revenue Agent would generally include acts reasonably calculated to further the investigative objectives of such government agency.

However, Respondent Feinglass's remarks such as "I wonder how he can sleep at night" (App.Ex.G and D.C. Ex.C) would fall outside the scope of the Agent's duties, inasmuch as the purpose of such remarks would not be to derive information to determine the federal income tax liability of any subject.[5] Despite Respondents' suggestion to the contrary, there is no functional relationship between alleged conduct engaged in by the Respondents and the goal of determination of a taxpayer's liability. Therefore, the actions were not in pursuit of the investigative functions of Respondents, but were instead, outside the Respondents' line of duty. See *McKinney v. Whitfield*, 736

[5] The remarks "If I were you I would not have Goulding represent me" (App.Ex.G); "shoot Randy" (App.Ex.G and D.C.Ex.Q); that a certain audit was "a result of Goulding's activities" (App. Ex.I-2); and characterization of Petitioner's transactions as "flakey" (App.Ex.I-3); remarking to one of Petitioner's most important clients "Have you seen Goulding lately? I feel sorry for him. He sure looks haggard." (App.Ex.G, p.15), were all similarly made outside the scope of the Respondents' duties, not made to determine any taxpayer's tax liability, nor reasonably calculated to further any investigative objectives of the Internal Revenue Service. Additionally, at least one person interviewed remarked that he could not determine the purpose for which he was interviewed and that it did not appear to have anything to do with any audit. (App. Ex.G and D.C.Ex.C).

F.2d 766 (D.C. Cir. 1984); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975); and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), holding that the President of the United States was only entitled to immunity where the action is closely related to the immunity's justifying purpose, the effective functioning of the government.

With regard to the primary Respondents, Dietz and Feinglass, the Petitioner has pleaded and supported by affidavit sufficient facts which if taken in a light most favorable to him, establish actions outside of the Respondents' line of duty. If nothing more, the Petitioner has established that the Respondents have violated clear guidelines and standards delineating the scope of an Internal Revenue Agent's duties. The violation of these guidelines took all subsequent actions by Dietz and Feinglass outside of the outer perimeter of the scope of their duties. In addition, it is well settled that not all activities of Agents while on duty are in furtherance of such duty, and thus not all are within the scope of their activity. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Accordingly, actions taken in knowing disregard of these stated procedural requirements, particularly when not reasonably calculated to fulfill the designated function of determining tax liability, should not be condoned or granted the immunity of actions within the plain limits of authority.

6. Application of *Davis v. Scherer*, 468 U.S. 183 (1984). Assuming that a Constitutional violation has been adequately alleged, but it is determined that the complained-of conduct is within the scope of Respondents' employ, then they are entitled to a qualified immunity. In such event, a plaintiff must show that the violation is of a "clearly established" statutory or constitutional right. However, the Respondents have violated the following clearly established constitutional rights:

the Plaintiff's Fifth Amendment Right to Due Process, based upon violations of both property and liberty interests; and

the Plaintiff's First Amendment Right to Freedom of Speech and Freedom to Petition one's government regarding one's grievances.

The cases cited by the Petitioner and the countless decisions which have followed them illustrate that both the First and Fifth Amendments have been firmly a part of Constitutional law for decades. Furthermore, given the legal training of Respondents, these rights are even more clearly established in their minds.

7. ***Davis v. Scherer*, the Subjective Element.** The Petitioner contends that the decision in *Davis* should be limited in its application to those instances where the alleged conduct violating a constitutional right, consists of relatively minor and random acts, as opposed to intentional and non-random acts. However, where conduct evidencing intent is easily demonstrable and is supported by affidavit, the failure to point to a prior case on all fours should not deprive a plaintiff of a cause of action.

By analogy, a distinction has been drawn between relatively minor and random acts, and intentional and non-random acts for purposes of determining whether an individual should be entitled to pre- as opposed to post-deprivation due process, the latter requiring more immediate resolution. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Haywood v. Younger*, 769 F.2d 1350 (9th Cir. 1984); and *Bretz v. Kelmer*, 773 F.2d 1026 (9th Cir. 1985).

In the case at bar, the Petitioner has pleaded and supported by affidavit calculated conduct on the part of the Respondents, aimed at violating his various constitutional rights. This calculated conduct was engaged in between

the Respondents as co-conspirators, and consisted of numerous acts as opposed to a single intentional or negligent act. This calculated conduct has continued to date unabated since it first began sometime prior to October of 1984. Furthermore, this conduct was engaged in by Respondent Dietz, who is an attorney himself, and by Respondent Feinglass, who has had significant legal training to understand the First and Fifth Amendments and to appreciate the consequences of their conduct.

Petitioner contends that these acts, properly supported by affidavit, should be sufficient to state a cause of action, even if the constitutional rights claimed were not clearly established. In situations as aggravated as those present in the case at bar, it would appear that the government's interest in protection of its employees from suit should no longer take precedence, and qualified immunity becomes inappropriate.

8. **Amendment of Pleadings.** On August 9, 1985, immediately after the Respondents filed their Reply to Petitioner's Brief in opposition to Summary Judgment, the Petitioner filed a Motion for Leave to Respond to Respondents' Reply Brief, to Supplement the Record and to amend his Complaint to add a count based upon violation of his First Amendment rights. The District Court denied this motion. Nor did the District Court, in its order of September 9, 1985, permit Petitioner to amend his pleadings. In light of the liberal nature of Rule 15 of the Federal Rules of Civil Procedure, the Petitioner contends that in both instances the District Court has erred and the Seventh Circuit erred in affirming.

CONCLUSION

Petitioner does not contend that the Respondents revenue agents lack decision making power or authority; nor does he contend that the judiciary should normally inquire into the motivations of revenue agents. However, Respondents' conduct has violated Petitioner's First Amendment and Fifth Amendment rights under the Constitution of the United States. The deprivations resulted without due process of law and without Goulding having any meaningful hearing or other means of vindication or means of curtailing the abuses (despite his diligent attempts to find such means), and without any judicial determination of any wrongdoing by Goulding.

The very essence of a free society is the ability of one to redress wrong. A determination that one is without remedy for a government employee's intentional abuse and without the right to curtail such abuse would make the rights guaranteed by the First Amendment and Fifth Amendment of dubious value.

The preclusion of one from redressing or curtailing such abuse would make us all slaves to indiscretions and abuses of government employees. Is one without remedy for conduct constituting intentional and malicious infliction of damage to citizens, violative of fundamental rights, with such extremely adverse consequences to such citizens, including the loss of business and reputation, where much of the conduct is not in furtherance of any of the Respondents' investigative objectives?

These Constitutional rights so violated by Respondents were all "clearly established." Due to Respondents' legal training, the illegality of each of the retaliatory acts were all the more "clearly established" in the minds of the Re-

spondents, making it all the more evident that Respondents knew or should have known of the illegality and of the constitutional violations of their conduct. Accordingly, Respondents knowingly violated Petitioner's Constitutional rights. In addition, many of the Respondents' acts were outside the scope of their employment, and not in reasonable pursuit of their legitimate investigative functions and thus ineligible for the claimed qualified immunity. Furthermore, the alleged conduct was not a single isolated event as in *Davis v. Scherer*, 468 U.S. 183 (1984), but a series or pattern of illegal acts. Finally, many of the complained-of acts of Respondents can be easily tied to and shown to be in retaliation to one or more exercises of First Amendment rights on the part of Petitioner.

Conduct which would normally be considered non-abusive, when it can be linked to Petitioner's attempts to vindicate his reputation and to preserve his Constitutional rights (as in the case at hand), leads to the inescapable conclusion that the Respondents' conduct is tainted with illegal, unauthorized and improper purpose. Such conduct is not worthy of immunity. Such conduct, without redress, cannot be tolerated in a free society. If our society is to be free, its citizens must be free from unreasonable and costly unredressable deprivations of property or liberty vindictively perpetrated at the whim of Respondents and other government agents.

Of what importance or significance is the Bill of Rights if the Government or its employees are not accountable for their actions. And of what importance and significance is the Bill of Rights if the Government or its employees can repeatedly violate such fundamental rights with total impunity. Immunity from redress for the willful violation of fundamental rights does not promote the proper and effective functioning of the I.R.S., particularly when such

conduct is not even in furtherance of proper government functions.

Accordingly, this Court should reverse the decision of the Seventh Circuit, permit Petitioner to file an amended complaint that would include a count based upon the First Amendment violations as well as plead new events, and remand the cause for trial on the merits.

Respectfully submitted,

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Pro Se

May 12, 1987

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2783

RANDALL S. GOULDING,

Plaintiff-Appellant,

v.

IRVING FEINGLASS and IRWIN SOLOMON,

Defendants-Appellees.

RANDALL S. GOULDING,

Plaintiff-Appellant,

v.

THOMAS DIETZ,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 85 C 1978, 85 C 1979—**Thomas R. McMillen**, *Judge.*

ARGUED MAY 13, 1986—DECIDED FEBRUARY 4, 1987

Before WOOD, COFFEY and FLAUM, *Circuit Judges.*

COFFEY, *Circuit Judge.* Randall S. Goulding appeals the decision of the district court dismissing his lawsuit against employees of the Internal Revenue Service for

want of federal jurisdiction and the district court's denial of his motion for leave to amend his complaint. We affirm.

I

This case involves a claim by Randall S. Goulding, the plaintiff-appellant, that Irving Feinglass, Irwin Solomon and Thomas Dietz (defendants-appellees) as employees of the Internal Revenue Service ("I.R.S.") violated his constitutional rights in conspiring to destroy his practice as a lawyer. Goulding is an attorney with a practice in the Chicago metropolitan area. The focus of the plaintiff's practice is primarily in tax law, and he specializes in advising his clients on limited partnerships and building tax shelters. Prior to entering the private practice of law, he was employed by the I.R.S. as a Special Agent and Revenue Agent from 1972 to 1978.[1]

Two of the defendants-appellees, Dietz and Feinglass, are employed as agents in auditing and investigatory work in a Chicago office of the I.R.S. The plaintiff formerly worked in the same office. Solomon is a supervisory revenue agent whose duties include supervising the work of the defendants Dietz and Feinglass and assigning income tax return investigations to agents.

The plaintiff claims he first met the defendant Dietz in 1973 while both of them were employed with the I.R.S. in Chicago and Feinglass in 1981 when Feinglass was investigating an entity Goulding represented.

During the past several years Feinglass and Dietz have conducted investigations of several of Goulding's clients involved in limited partnerships.[2] Goulding claims in the

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[1] Special Agents investigate charges of criminal and civil violations of Internal Revenue laws, generally involving tax fraud. Revenue Agents examine and audit the books of individual and corporate taxpayers to determine their federal tax liability.

[2] One of these investigations resulted in the assessment of tax preparer penalties against Goulding pursuant to 26 U.S.C. 6694(a)

(Footnote continued on following page)

course of their investigations that the two agents had harassed him, made defamatory comments about him as well as his competence as an attorney, and conspired with Solomon to ruin his reputation as a lawyer and destroy his legal practice.[3]

On October 4, 1984, Goulding sent a letter to Robert Starkey, the Chicago District Director of the Internal Revenue Service claiming that Feinglass appeared to be biased and requesting an investigation of Feinglass' conduct. The plaintiff claimed in this letter that Feinglass had engaged in a course of conduct that included making derogatory statements about him to a number of clients. On November 15, 1984, Dietz caused five summonses to be issued on Goulding to obtain testimony and the production of certain exhibits dealing with the five limited partnerships then under investigation by the I.R.S.[4] A few days later, on November 19, 1984, the plaintiff wrote Solomon requesting that Dietz and Feinglass be removed from investigating any cases where he was involved representing clients and further that new agents be substituted. On December 6 of the same year the plaintiff sent a letter to the Commissioner of Internal Revenue, Roscoe

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[2] *continued*
for negligent or intentional disregard of rules and regulations. At the time of this appeal, Goulding was challenging the assessments in a suit for refund. *Goulding v. United States*, (N.D. Ill. Civ. No. 83 C 5692).

[3] Among the statements that the plaintiff claims Feinglass made was "all Goulding's deals are flaky. You should see how flaky his other deals are." Goulding also asserts that Dietz notified him at one point that he (Dietz) would audit every partnership Goulding ever formed.

[4] Goulding failed to appear on December 10, 1984, and the United States Attorney filed five enforcement petitions on December 20, 1984. Goulding responded to the petitions by raising affirmative defenses and filing a counterclaim against Dietz on February 22, 1985. The counterclaim formed the basis of this suit. Defendants Solomon and Feinglass were later added as party defendants in a third party complaint. All five summonses were eventually enforced.

Egger, voicing his concerns about the conduct of Dietz and Feinglass and requesting their removal from any audits involving Goulding. On January 30, 1985, the Chicago District Director of the Internal Revenue Service, Robert Starkey, responded to both the November 19th and December 6th letters[5] and informed the plaintiff Goulding that neither Dietz nor Feinglass would be removed from any of the pending investigations because based upon his investigation of the complaints he was convinced that "no conflict on the part of Revenue agents Dietz and Feinglass exist[ed]."

On March 8, 1985, the plaintiff sought a temporary restraining order against the three defendants to enjoin them from libeling, slandering or defaming him, threatening him with tax penalties, violating his constitutional privacy and due process rights, and interfering with his business by defaming him to his current or potential clients. That same day the plaintiff also filed complaints against the three defendants seeking a total of $17,000,000 in compensatory and punitive damages for alleged constitutional and common law torts.[6] On March 15, 1985, the district court denied Goulding's motion for a temporary restraining order.

After the filing of the defendants' motion for summary judgment on May 22, 1985, and submission for decision, the plaintiff on August 5 filed a motion requesting leave to supplement the record, to respond to the defendants' reply to the plaintiff's memorandum in opposition to summary judgment, and to amend his complaint to add a First Amendment claim. The trial court denied the plaintiff's August 5 motion.

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[5] The December 6 letter was referred to the District Director's Office for response by the Commissioner of the Internal Revenue.

[6] Goulding's charges included libel and defamation of character, tortious or malicious interference with contract, abuse of process and malicious prosecution, intentional infliction of emotional distress, conspiracy, Fourth Amendment violation of his rights, and violation of his Fifth Amendment rights.

In its order and decision dated September 6, 1985, the district court dismissed the complaints originally filed March 8, 1985 for lack of federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The plaintiff, on appeal, raises two issues: 1) Whether the district court properly dismissed the complaints against the defendants for lack of jurisdiction; and, 2) whether the district court properly denied the plaintiff's motion for leave to amend his complaints to assert violations of the First Amendment to the Constitution.

II

A prerequisite in maintaining an action in federal court under 28 U.S.C. § 1331[7] is that the plaintiff must allege a violation of the United States Constitution or a federal statute. In his appeal, Goulding asserts that under the Due Process Clause of the Fifth Amendment that the defendants under color of law deprived him of both protected property and liberty interests in violation of his Fifth Amendment right to due process. Specifically, the plaintiff alleges that the defendants' actions, including the alleged harassment, threats and slanderous and defamatory remarks, have caused him to lose clients and virtually ruined the value of his right to practice law, thus depriving him of a protected property interest. The plaintiff argues, alternatively, that he has suffered the deprivation of a protected liberty interest from damage to his reputation and attendant loss of clients because of the conduct of the defendants.

Goulding claims that he has a protected property interest and entitlement in his "business as a lawyer."[8] He

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[7] Title 28, § 1331 provides:

> The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[8] The plaintiff does not dispute that the I.R.S. is acting within its authority when investigating the limited partnerships in which he is involved.

alleges that the defendants' actions and statements have tarnished his reputation, destroyed his practice, and made him less desirable professionally, thus depriving him of a protected property right. The Supreme Court has stated that not every expectation is entitled to due process protection of the Fifth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). A person does not have a property interest that merits due process protection unless he has a "legitimate claim of entitlement to it." *Id.* Property interests are:

> "[o]f course, . . . not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Id.

Analysis of Goulding's claimed deprivation of property and liberty interests must begin with the seminal Supreme Court case, *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul v. Davis*, the Supreme Court stated that injury to reputation alone, "[a]part from some more tangible interests such as employment," is not sufficient to rise to the level of the deprivation of a property or liberty interest. 424 U.S. at 701. Goulding argues that a "tangible interest"—his law practice—has been rendered valueless by the actions of the defendants.

The Supreme Court in *Paul v. Davis* makes clear that to find the deprivation of a property interest in the fact situation before this court, Goulding's legal rights or status must have been removed or significantly altered.[9] We are unable to understand after reviewing the plain-

[9] In *Paul v. Davis*, 424 U.S. 693 (1976), the State allegedly deprived the petitioner of property and liberty interests, thus the Due Process Clause of the Fourteenth Amendment was triggered. Although the instant case involves alleged action by employees of the United States Government and, thus, the Due Process

(Footnote continued on following page)

tiff's complaint and the record what rights he claims to have either had removed or significantly altered. The plaintiff has not lost the right to practice law, his license to practice law has not been revoked or suspended, and he is still practicing before the I.R.S. Goulding has failed to cite any cases, nor have we found one case that establishes a property right in an individual's "business as a lawyer." We agree with the finding of the district court and hold that the plaintiff was not deprived of a property right.

Goulding cloaks his alleged deprivation of a liberty interest in much the same language as the alleged loss of a property interest: that his reputation has been damaged by the actions of the defendant with resulting loss of clients and business. *Paul v. Davis* held that the infliction by the government of a stigma on one's reputation, without more, does not infringe upon a liberty interest protected by the Constitution's due process safeguards.

Even though Goulding feels he may have been stigmatized by the investigations and statements allegedly made by the defendants, this does not amount to the deprivation of a liberty interest as set forth in *Paul v. Davis*. The plaintiff is not foreclosed from practicing law whether it be in tort, criminal, corporation or tax law. From the

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[9] *continued*

Clause of the Fifth Amendment is implicated, the language of *Paul v. Davis*, 424 U.S. 693 (1976), is still instructive:

> "It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status."

424 U.S. at 710-711 (footnote omitted).

information set forth in record, he is still a member in good standing of the Illinois Bar and thus is qualified to represent clients before the I.R.S. The investigations and alleged comments may very well have made him less attractive to clients,[10] but this Court stated in *Perry v. Federal Bureau of Investigation*, 781 F.2d 1294, 1302 (7th Cir. 1986): "[a] liberty interest is not implicated merely by a reduction in an individual's attractiveness to potential employers." There is no legal barrier to Goulding pursuing his practice of law. We therefore hold that the district court's finding that Goulding was not deprived of a liberty interest was proper.[11]

III

Goulding also appeals the trial court refusal to allow him to amend his complaint to include a claim based on the First Amendment,[12] thus we must decide whether the court erred in denying the plaintiff's motion to amend his complaint under Rule 15(a) of the Federal Rules of Civil Procedure.[13] "Of course, the grant or denial of a motion

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[10] In the plaintiff's reply brief he states that he has been sued by investors in transactions audited by the defendants and has received threats of numerous additional suits.

[11] We need not discuss the plaintiff's argument regarding whether the defendants are entitled to qualified immunity as government officials since we hold that the plaintiff was neither deprived of a property nor a liberty interest.

[12] Goulding's motion to amend his complaint to add his First Amendment claim was filed on August 5, 1985. The defendants had previously moved for summary judgment on May 22, 1985, and the plaintiff had responded on July 3, 1985.

[13] Rule 15(a) of the Federal Rules of Civil Procedure provides in part:

> A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Knapp v. Whitaker*, 757 F.2d 827, 849 (7th Cir. 1985). Thus, we set aside the district court's refusal to allow Goulding leave to amend only if the court abused its discretion.

This court in *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061 (7th Cir. 1979) stated:

> "[A] motion [to amend] is always made to the sound discretion of the district court and the court may deny a leave to amend where the proposed amendment fails to allege facts which would support a valid theory of liability, . . . , or where the party to amend has not shown that the proposed amendment has substantial merit. . . ."

598 F.2d at 1063 (citation omitted). In the instant case the plaintiff claims his rights under the First Amendment were violated because the alleged vindictive acts (alleged threats of further audits and the imposition of penalties, alleged defamatory remarks about the plaintiff, an alleged threat to institute proceedings to bar him from practicing before the I.R.S.) of the defendants were in retaliation for the plaintiff's exercise of his right of free speech and freedom to petition the government for redress of grievances. The plaintiff attempts to transform the same arguments he makes under the Fifth Amendment and clothe them in the garb of a First Amendment claim. Like his claims under the Fifth Amendment, Goulding has failed to demonstrate how his rights under the First Amendment have been infringed. The I.R.S.'s investigations of his transactions and limited partnerships have continued for reasons that appear clearly justifiable. Our reading of the plaintiff's First Amendment claim and the record convinces us that the agents and their supervisor were merely fulfilling their duties in investigating potentially abusive tax schemes. We refuse to hold that the district court abused its discretion in refusing to allow the proposed

amendment.[14] We agree with the trial court's denial of the plaintiff's motion to amend since the plaintiff's proffered amendment was without merit.

IV

We hold that the district court's dismissal of the plaintiff's claims was proper because there was a lack of federal jurisdiction since the plaintiff has failed to demonstrate either a violation of the United States Constitution or a federal statute. We also hold that the district court's denial of the plaintiff's motion to amend his complaint was proper. Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[14] The plaintiff argues that since the district court failed to give a reason for denying his motion for leave to amend that the court abused its discretion. Leave to amend is "freely given when justice so requires." Here the plaintiff clearly failed to make the required showing.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 13, 1987.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

RANDALL S. GOULDING,

Plaintiff-Appellant,

No. 85-2783 vs.

IRVING FEINGLASS and IRWIN SOLOMON,

Defendants-Appellees.

RANDALL S. GOULDING,

Plaintiff-Appellant,

vs.

THOMAS DIETZ,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 85 C 1978, 85 C 1979—**Thomas R. McMillen,** *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RANDALL S. GOULDING,

Plaintiff,

No. 85 C 1978 v.

IRVING FEINGLASS and IRWIN SOLOMON,

Defendants.

RANDALL S. GOULDING,

Plaintiff,

No. 85 C 1979 v.

THOMAS DIETZ,

Defendant.

DECISION

Plaintiff has filed two lawsuits against the defendant I.R.S. agents whom, he contends, deprived him of his rights under the Fourth and Fifth Amendments to the United States Constitution. Except for the identity of the defendants, the complaints are substantially the same, and the government has filed a motion to dismiss them for lack of federal jurisdiction. If federal jurisdiction is found lacking, then any claims based upon state law must fall, since there is no diversity jurisdiction here. We find and

conclude that the motions of the defendants are well-founded and that both complaints should be dismissed.

Plaintiff is an attorney practicing in the Chicago area and was an I.R.S. agent from 1972 through 1978. Defendants are agents in the same I.R.S. unit in Chicago, Dietz and Feinglass being involved in investigatory and auditing work and Solomon being their supervisor. Plaintiff was apparently friendly with defendants while he was employed by the I.R.S.

After plaintiff left his government employment, agents Dietz and Feinglass conducted investigations of several of plaintiff's clients which have resulted in at least one preparer claim against the plaintiff pending in this court (83 C 5692). Other entities represented by plaintiff or whose owners are represented by him are still under investigation, and the present lawsuit was originally filed as a counterclaim to the government's petition for enforcement of defendants' subpoenas against Goulding or the entities which he allegedly represents.

The pending complaint (formerly a counterclaim) alleges that the defendants are engaged in a conspiracy to destroy plaintiff's business and also have made several libelous or slanderous statements about his professional conduct. Some of these statements are contained in affidavits which plaintiff has filed, along with his own affidavit, but we need not go into the question of whether or not the affidavits are hearsay or whether the alleged statements were libelous or slanderous, because we do not find federal jurisdiction in this case.

Violations of plaintiff's rights under the Fourth and Fifth Amendments to the United States Constitution are alleged in Counts V and VI of the complaint against Feinglass and Solomon (85 C 1978), and Counts VI and VII of the complaint against Dietz (85 C 1979). The Fourth Amendment claims merely complain about governmental activities in connection with I.R.S. investigations, including the service of the third-party summons, to which Goulding has recently consented. Neither plaintiff's complaint nor

his lengthy affidavit show any personal or private rights which have been violated by the I.R.S. investigation. If confidential information, as distinguished from private or personal information, has been improperly published or released by the defendants, plaintiff may have his remedy under 26 U.S.C. § 7431(a). Neither this statute nor any of the facts alleged by plaintiff give him a right to sue the defendants personally, however. *Mid-South Music Corp. v. Kolak*, 756 F.2d 23 (6th Cir. 1985).

The plaintiff's claim under the Fifth Amendment is to the effect he has been deprived of his profession without due process. For this to occur, he must first have a "liberty" or "property" interest under *Mathews v. Eldridge*, 424 U.S. 319 (1976). An investigation of plaintiff's clients or business entities, however, is distinct from his intangible business as a lawyer and has often been held to be unprotected against I.R.S. investigations. *Mid-South Music Corp. v. Kolak*, *supra*, p. 3; *Foxman v. Renison*, 625 F.2d 429 (2d Cir. 1980); see also *Investment Annuity, Inc. v. Blumenthal*, 609 F.2d 1 (D.C. Cir. 1979). Nor has plaintiff alleged the deprivation of a protected liberty interest within the meaning of the due process clause of the Fifth Amendment. *Paul v. Davis*, 424 U.S. 693 (1976).

Even should the complaint withstand a motion to dismiss for failure to state a claim, defendants are entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Plaintiff has cited no case and we know of none which established a clear constitutional right, of which any defendant should have known, to be free from I.R.S. investigations and summonses. In fact, the law is to the contrary, that defendants did not violate any clearly established constitutional right of the plaintiff in conducting their investigations.

Since we find that the counts of the complaint which attempt to allege a violation of the United States Constitution fail to do so, the pendent state law claims for libel, slander, tortious interference with contractual relations, and intentional infliction of emotional distress must

be dismissed. *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). It is only when federal jurisdiction has apparently been obtained and the case has proceeded to the trial stage that the federal court will continue to exercise jurisdiction over pendent claims, absent a determination of federal jurisdiction. See generally *Buethe v. Britt Airlines, Inc.*, 749 F.2d 1235 (7th Cir. 1984). This is a matter of fairness and equity based largely upon discretion of the trial court, and we see no such equity in favor of the plaintiff in the cases at bar.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motions of the defendants to dismiss the complaints are granted. A Rule 58 judgment will be entered in favor of the defendants in both cases.

ENTER:

/s/ Thomas R. McMillen
United States District Judge

DATED: September 6, 1985